82-1984

No. _____

In the

Supreme Court of the United States

October Term, 1982

Charles Smith ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

JOHN W. ACHOR
The John Haskins Law Firm
1690 Union National Plaza
Little Rock, Ark. 72201
501/372-2224

Attorney for Petitioner

QUESTION PRESENTED

Whether a Defendant's Fourth and Fifth Amendment rights are violated by a state trial court's holding that a defendant, if he chooses to testify in a pre-trial evidentiary suppression hearing, is open to cross-examination about all matters, and when limitation of cross-examination is also provided for by state rules as well.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner Charles Smith petitions for a Writ of Certiorari to review the affirmance, by the Supreme Court of Arkansas, for his conviction for possession of a controlled substance with intent to deliver.

OPINION BELOW

The original opinion of the Supreme Court of Arkansas, reproduced in the appendix, is reported as *Smith v. State*, 278 Ark. 462 (1983).

JURISDICTION

The decision of the Supreme Court of Arkansas, denying a timely petition for rehearing, was issued on April 4, 1983. This Court's jurisdiction is invoked in the 28 U.S.C. 1257(3), with Petitioner asserting a deprivation of rights secured by the Constitution of the United States.

STATEMENT OF THE CASE

On September 14, 1981, Petitioner was stopped while driving an automobile in Van Buren County, Arkansas. The law enforcement officer obtained access to the trunk of his vehicle and a substance, subsequently identified as marijuana, was seized. The following day a felony information was filed in the Circuit Court of Van Buren County.

A pre-trial hearing was held on November 25, 1981 on Petitioner's Motion to Suppress Evidence on grounds of seizure pursuant to an arrest without probable cause, without a warrant, and without a valid consent. The motion was denied. A jury trial was held on December 9, 1981. Petitioner was convicted of possession of a controlled substance with intent to deliver, and was assessed a sentence of six years in the Arkansas Department of Correction by the jury and fined $1,000.

A timely Notice of Appeal was filed. The appeal was eventually transferred from the place of its original docketing, the Arkansas Court of Appeals, to the Supreme Court of Arkansas under state appellate rules. By decision rendered February 28, 1983, the Supreme Court confirmed Petitioner's conviction. There was one dissent.

A timely Petition for Rehearing was filed and this petition was denied and the mandate issued on April 4, 1983. Trial and appellate counsel was relieved and current counsel substituted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fifth Amendment, United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

Rule 104(d), Arkansas Uniform Rules of Evidence:

> The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF A TRIAL COURT TO LIMIT CROSS-EXAMINATION OF A DEFENDANT IN A PRE-TRIAL MOTION TO SUPPRESS EVIDENCE, IS VIOLATIVE OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS, BOTH PER SE AND IN VIOLATION OF DUE PROCESS BY CONTRAVENTION OF STATE PROCEDURE.

Petitioner was stopped and arrested while driving an automobile in Van Buren County, Arkansas. At a pre-trial hearing on the Motion to Suppress Evidence, Petitioner desired to present testimony with regard to the issue of consent, or lack thereof. The trial court held *in limine*, that cross-examination would not be limited to the issue under consideration and that "I feel like if you put him on, the State can ask him whatever they want to ask him." (T. 52) As a result, Petitioner did not testify in the hearing on the Motion to Suppress Evidence.

This issue was brought up on appeal to the Supreme Court of Arkansas. However, the Arkansas court, with one dissent, declined to address the merits, saying that an insufficient proffer was made. The dissent by Justice Purtle noted that the ruling was clearly an incorrect statement of the law and expressed the opinion that a sufficient appellate record was made.

A trial court's holding that a defendant, in testifying with regard to a pre-trial evidentiary motion, waives his Fifth Amendment rights, is clearly erroneous. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). A defendant cannot be compelled to waive one right in order to exercise another.

In addition to the constitutional bases for absence of waiver, Rule 104(d) of the Arkansas Uniform Rules of Evidence notes that "an accused does not, by testifying

upon a preliminary matter, subject himself to cross-examination as to other issues in the case." Moreover, a conviction obtained in violation of state procedural rules is, in itself, a violation of a defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Clearly, that is what happened in this case. The Petitioner desired to testify in the motion to suppress and his attorney moved *in limine* to prevent cross-examination as to other issues. The trial court denied his motion with an erroneous statement of law. This violated his rights guaranteed by the Fourth and Fifth Amendments, made applicable to the state by the Fourteenth Amendment.

CONCLUSION

Petitioner therefore respectfully prays that this honorable Court grant this Petition for Writ of Certiorari to the Supreme Court of Arkansas on the matter in issue herein discussed.

Respectfully submitted,

JOHN W. ACHOR
The John Haskins Law Firm
1690 Union National Plaza
Little Rock, AR 72201
501/372-2224

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, John W. Achor, attorney for Petitioner, do hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari to the Honorable Steve Clark, Attorney, General, Justice Building, Little Rock, AR 72201, by depositing the same in the U.S. mail, first class postage prepaid, this 3rd day of June, 1983.

/s/ John W. Achor
JOHN W. ACHOR

APPENDIX A

SUPREME COURT OF ARKANSAS
NO. CR 83-22

Opinion Delivered February 28, 1983.

CHARLES SMITH,

Appellant,

V.

STATE OF ARKANSAS,

Appellee.

Appeal from Van Buren Circuit Court; George F. Hartje, Judge

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. The appellant, charged with possession of seven pounds of marihuana with intent to deliver, was convicted by a jury and sentenced to a six-year prison term and a $1,000 fine. The Court of Appeals transferred the case to us under Rule 29 (4) (b).

While the case was pending in that court, the appellant's attorney filed a brief without a proper abstract of the testimony. When the Attorney General called attention to the deficiencies, the Court of Appeals correctly gave effect to Rule 9 (e) (2) by denying appellant's motion to be allowed to file a *supplemental* abstract and brief, but permitting counsel to file a *substituted* abstract and brief. Counsel, however, disregarded the plain language of both the rule and the order by filing a mere supplemental abstract and brief. The rule does not contemplate that anything less than a complete, substituted abstract and brief may be filed in the circumstances; so we must treat the supplemental abstract and brief as the appellant's only one in the case. When, as here, an appellant's abstract is deficient, our practice is to rely on the record if it shows

that the trial court's decision should be affirmed on a particular point, but not to explore the record for prejudicial error if none is shown by the abstract.

On September 14, 1981, Kirk Hicks was a Van Buren county deputy sheriff and also a police officer employed by the city of Damascus. That night he stopped the appellant's car because it had no taillights. The officer, having some reason to suspect that the appellant or his companion had unlawfully killed a deer, searched the trunk of the car and found not a deer but seven pounds of marihuana. After the trial counsel filed a motion for new trial on the ground that Hicks was not a certified law enforcement officer, so that the arrest and search were illegal. The denial of that motion is the first ground for reversal.

No reversible error is shown. Act 452 of 1975, as amended, provides for the certification of law enforcement officers and recites that official action taken by an uncertified officer is invalid. Ark. Stat. Ann. §42-1007 (Supp. 1981) and §42-1009 (Repl. 1977). Section 42-1007 also provides, however, that full-time officers serving on the effective date of the act may continue in their employment. Officer Hicks had been a police officer for some years before the passage of the 1975 act and was therefore exempted by its "grandfather clause." It is not clear that he lost his status by moving from Stone county to Damascus and continuing in police work there. *See* §42-1007. In any event, all the facts were available to counsel before the trial; so the motion for new trial was not supported by the necessary showing of diligence. *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

A second argument is that the trial judge should not have answered the jury's inquiry, during their deliberations, about parole eligibility for a person sentenced to one year in jail. Defense counsel, however, agreed in response to a question by the trial judge that information about "the parole situation" could be given to the jury. That

distinguishes this case from our holding in *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971), for counsel cannot consent that the trial judge take some action and then seek a reversal on the basis of that action. *Clark v. State*, 213 Ark. 652, 212 S.W.2d 20 (1948).

A third argument is that the appellant did not voluntarily consent to the search of the trunk of his car. The substituted abstract of the testimony at the suppression hearing does not show that the consent was not voluntary. It is also argued that the trial judge was wrong in ruling that if the defendant took the witness stand at the suppression hearing he could not limit his testimony to the issue of whether or not his consent was given. Even so, there was no proffer of what the defendant's testimony would have been; so we have no way of knowing whether he would have testified to facts rebutting his asserted consent to the search. *Barnes v. Young*, 238 Ark. 484, 382 S.W.2d 580 (1964).

Affirmed.

Purtle, J., dissents.

APPENDIX B

SUPREME COURT OF ARKANSAS
NO. CR 83-22

Opinion Delivered February 28, 1983.

CHARLES SMITH,

Appellant,

V.

STATE OF ARKANSAS,

Appellee.

Appeal from Van Buren Circuit Court; George F. Hartje, Judge

Dissent

JOHN I. PURTLE, Associate Justice

I disagree for two reasons. First, it was reversable error for the trial court to rule that if appellant took the stand at the Denno hearing he had no right to refuse to testify on any matter the state chose to inquire about. Second, it was prejudicial error to allow the jury to receive evidence of parole eligibility, which in all probability was wrong anyway.

The Denno hearing was conducted to determine whether appellant had given a valid consent to the search of the trunk of his automobile. The officer was told by appellant that he did not want his vehicle searched. No doubt the presence of the purported deputy sheriff with his pistol at his side influenced appellant to change his mind and consent to the search. I am not so naive as to believe the appellant simply changed his mind and agreed to incriminate himself for the convenience of the purported officer. Consent to an invasion of privacy must be proven by clear and positive testimony and this burden is not met by showing acquiescence. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d

636 (1980). *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). Had the trial court not ruled the appellant could not testify without waiving his immunity the preponderance of the testimony would have, no doubt, revealed that the state did not meet the burden required to validate an otherwise illegal search. The court stated at the Denno hearing: " . . . once he takes the stand, he does not have the right to not answer . . . if you put him on, the state can ask him whatever they want to ask him." This is plainly a misstatement of the law. I further think that the acting deputy sheriff had no idea what was in the trunk of this vehicle but merely wanted to look around to see what he could find, as is the case so often when officers are permitted to make seizures without probable cause, or warrant, as required under the Fourth Amendment.

Next, even if appellant's attorney agreed to the court's improper comment on the parole system it was the duty of the court not to do so. The matter never should have reached the point where appellant's counsel consented to it. In *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971) we had before us a case where the court made a similar improper statement to the jury and there we stated:

> Accordingly, we have concluded that this information should not be given the jury, and when asked for such information, the court should reply, in effect, that it is improper for the court to answer the inquiry and an answer might well constitute reversible error; that the jury need not concern itself with the matter; that the control of the parole system is committed by law to the legislative and executive branches of the government, and, that the jury, if reaching a verdict of guilty, has only the duty of imposing such punishment as may be considered, under the court's previous instructions, to be appropriate.

It is likely that the statement to the jury was incorrect anyway as to the amount of time the appellant would have to serve before becoming eligible for parole. Any

explanation of the parole system to a jury is improper, but incorrect information compounds the error. Therefore, I would reverse and remand for a new trial after the evidence obtained by the illegal search is suppressed. Affirmed.

APPENDIX C

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

April 4, 1983

John W. Achor
Attorney at Law
1690 Union National Plaza
Little Rock, AR 72201

Re: CR 83-22 Charles Smith v. State of Arkansas

Dear Mr. Achor:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:rh

cc: Victra L. Fewell
Sammy Collums